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BOOK REVIEWS

A Trial of Generals: Homma, Yamashita, MacArthur By Lawrence Taylor. South Bend: Icarus Press, 1981.

On September 3, 1945, General Tomoyuki Yamashita, commander of the Japanese forces in the Philippines, surrendered to the victorious U.S. Army under the command of General Douglas MacArthur. In October of that same year, General Yamashita was tried in Manila for violating the law of war, and on December 7, 1945, he was found guilty of the offense. After an unsuccessful appeal to the U.S. Supreme Court, General Yamashita was executed by hanging on February 23, 1946, by the U.S. Army in a small town outside Manila.

A similar fate befell General Masahara Homma because of his responsibility for the infamous Bataan Death March in which about 7,000 American servicemen died. After the Japanese, under the command of Homma, overcame the U.S. forces in the Philippines in early 1942, the captors marched the 100,000 POWs out of the jungles of the Bataan Peninsula. This set the scene for the deaths that were to follow. General Homma was also afforded a trial which resulted in his conviction for war crimes. He was executed by a U.S. Army firing squad in the Philippines on April 3, 1946.

Lawrence Taylor's recent book, *A Trial of Generals*, is much more than an account of the trials and appeals of Generals Yamashita and Homma. The "generals" of the title include not only the Japanese defendants but also the victorious U.S. commander and the ultimate prosecutor, Douglas A. MacArthur. MacArthur himself is first and foremost on trial in the book, and the evidence to convict him is, in the author's view, overwhelming and beyond a reasonable doubt. MacArthur stands convicted of vindictiveness, pettiness, and the unscrupulous and perverse use of the forms of U.S. justice to achieve personal satisfaction and unwarranted vindication.

Taylor, a criminal attorney in Los Angeles, provides a vivid account of the backgrounds of the Japanese generals. Ironically, neither general was part of the war party that controlled the Japanese Government prior to Pearl Harbor. Both had counselled restraint for tactical and moral reasons, and both had consequently incurred the enmity of the war-bound Japanese hierarchy.

General Homma was the commander who led the occupying forces that captured the Philippines in 1942. This situation forced MacArthur to take his humiliating departure from Bataan and Corregidor. His departure, however, was carefully staged for his dramatic statement, "I shall return." After the surrender of the remaining U.S. troops, Homma was shocked to find that he had captured a force twice the size of his own army. It was the sheer logistical problem of getting this vast body of men out of Bataan and into POW camps that led to the deaths of 7,000 U.S. soldiers. Taylor shows that the causes of these deaths were disease, heat, exhaustion and the occasional brutality of individual Japanese soldiers. By no means, however, was a massacre planned or sanctioned by Homma.

Yamashita was in command of Japanese troops in the Philippines in 1944 when the war was turning against Japan. With the U.S. invasion of the Philippines, Yamashita ordered his forces out of Manila and into the jungles. Unknown to him, his order to abandon Manila was countermanded by Admiral Sanji Iwabuchi, whose sailors proceeded to engage in a wholesale massacre of Philippine civilians in the city. Yamashita did not learn of this act of barbarism until later. MacArthur, nonetheless, held him personally responsible for this atrocity.

"[T]he evidence," Taylor concludes, "proves conclusively that neither of the Japanese generals was even negligent, much less guilty of war crimes. These were two of the most brilliant military leaders and strategists in Japan, with long records of distinguished and honorable service. . . . [B]oth were universally recognized as men of character and honor." Taylor's account of the two generals' probable innocence of the war crimes is only a minor part of his book. The major portion of the volume, which clearly furthers the author's thesis, is devoted to the trials of the two generals.

Both trials were held at the end of 1945, long before the Nuremburg and Tokyo War Crimes Trials. The tribunals, the rules of procedures, the unseemly haste of the proceedings and, ultimately, the verdicts were the decisions of one man—MacArthur. The author has no doubt about the nature of those proceedings: "[I]t is difficult to review the disgraceful proceedings without the words *railroaded* or *kangaroo court* coming into mind. Certainly, by contrast, the war crimes trials at Nuremburg and Tokyo were models of legal decorum. . . ."

The proceedings were, in fact, of questionable validity. Shortly after the surrender of Japan in September 1945, MacArthur, as the Supreme Commander for the Allied Powers and pursuant to specific authorization from the U.S. Joint Chiefs of Staff, proceeded to establish two war-crimes tribunals. The first was established in Tokyo to try major Japanese figures such as Tojo. Its proceedings, like those at Nuremburg, were conducted by a panel of independent judges from various countries. According to Taylor, this International Military Tribunal for the Far East "af-

forded [the defendants] every conceivable procedural safeguard." Those trials began in May 1946 and continued for two and a half years.

The second tribunal, which met in MacArthur's "adopted home" of Manila, was established to handle only the trials of Generals Homma and Yamashita—the men accused of being responsible for the atrocities of Bataan and Manila. In contrast to the Tokyo tribunal, the Manila tribunal considered charges filed three *weeks* after the Japanese surrender, and the trials were set to begin three *weeks* after that.

Taylor depicts what clearly appears to be MacArthur's main motive: revenge against the two defendants. Were the decks stacked? Yamashita was the first to be tried. The prosecutors were mostly experienced criminal prosecutors; the defense counsel team did not include a single criminal lawyer; none of the judges appointed by MacArthur were lawyers; the prosecution was appointed immediately; and the defense team was named shortly before the arraignment. The defendant was charged with over 60 counts of war crimes, and each crime was punishable by death. The defense team was refused a bill of particulars since, according to the chief prosecutor, that might be "appropriate in a court of law . . . but certainly not in this proceeding." (They were finally given a list of specific charges). The newly-appointed defense team, with only limited knowledge of the exact allegations against their client, was given three weeks to prepare its defense, and, on the order of MacArthur to the court, its motion for a continuance was denied.

MacArthur personally drafted the procedures to be followed at trial, as well as the rules of evidence. The essence of MacArthur's attitude is exemplified by Article 13 of his Special Proclamation: "The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible."

The conduct of the trial, as might be imagined, was perverted by the limitless admissibility of evidence. According to Taylor, witness after witness testified to brutalities. "Not once during the entire eight days of the prosecution's presentation," says Taylor, "was there a single shred of credible evidence linking Yamashita to the atrocities." The ability to cross-examine such witnesses meaningfully was meager, and yet the defense team was restricted even in its attempt to conduct cross-examination. The court ruled that "cross-examination must be limited to essentials, and avoid useless repetition of events or opinions. Except in unusual or extremely important matters, the commission will itself determine the credibility of witnesses." After a few days, the inevitable verdict of guilty was handed down by the tribunal. The same scenario, to which this review cannot do full justice, repeated itself in the case of General Homma.

General Yamashita's next step in the legal proceedings was an expe-

dited appeal to the Philippine Supreme Court, which soon delivered its ruling upholding the conviction. The court reasoned that to grant Yamashita's petition "would be a violation of faith" by interfering with the liberating U.S. Army.

General Yamashita then filed an emergency petition to the U.S. Supreme Court. (MacArthur, in the meantime, rejected a suggestion of the Secretary of War to delay the general's execution; it took a direct order to get MacArthur to postpone the hanging.) On December 20, 1945, the Justices decided to hear the case. Argument was held on January 7, 1946, and the decision was delivered on February 4: the majority upheld the conviction. The bases for the decision was simply that the military had the authority to conduct the trial and that the Supreme Court lacked jurisdiction to question the fairness of the proceedings. Justice Jackson did not take part in the decision and Justices Murphy and Rutledge strongly dissented. *Matter of Yamashita*, 327 U.S. 1 (1945).

Taylor's conclusions about the trials might be questionable if they were not confirmed by the vigorous dissent of Justice Rutledge in the U.S. Supreme Court's review of Yamashita's conviction. Rutledge's opinion mirrors that of Taylor with regard to the fundamental unfairness of the proceedings: "I cannot believe in the face of this record that the petitioner has had the fair trial that our Constitution and laws command. . . . The proceedings in this case veer so far from some of our time-tested road signs that I cannot take the large strides validating them would demand." 327 U.S. at 42, 43. Rutledge then detailed his objections to the conduct of Yamashita's trial: the denial of reasonable opportunity to prepare a defense, the doubtful admissibility and sufficiency of evidence, the lack of specificity of the charges, and ultimately the failure to charge or prove that Yamashita participated in or knowingly failed to take action to prevent the wrongs done by others.

According to Rutledge, the "fountainhead" of the authority of the military commission was General MacArthur's directive prescribing the rules and regulations to govern both the procedure and use of evidence. While no criticism was levelled directly at MacArthur, Rutledge was brutally frank in his conclusion regarding the directive:

A more complete abrogation of customary safeguards relating to the proof, whether in the usual rules of evidence or any reasonable substitute and whether for use in the trial of crime in the civil courts or military tribunals, hardly could have been made. So far as the admissibility and probative value of evidence was concerned, the directive made the commission a law unto itself.

327 U.S. at 49.

The major fault of the book is not Taylor's accuracy, which cannot be questioned, but his objectivity. Instead of allowing the facts to speak for

themselves, Taylor constantly belittles MacArthur personally. He refers to his "egotistical ambitions"; he contrasts him, unfavorably, with "Homma's gracious attitude"; he describes in detail the lush furnishings of MacArthur's prewar Manila apartment and his "huge supply of clothing - over two dozen uniforms and suits alone"; and he tells of MacArthur reenacting his return to the Philippines for the benefit of photographers. These details of MacArthur's idiosyncracies do not advance the author's thesis regarding the unfairness of the trial but distract the reader's attention.

In contrast, Taylor repeatedly expresses his admiration for Homma and Yamashita. While his praise of their virtues may well be justified (it appears that they were both cultured, sensitive individuals whose destiny was shaped by the fact that they each happened to humiliate MacArthur in battle), the reader becomes suspicious. The constant reminder that one or the other of the Japanese generals answered questions with "dignified restraint" or had a "gracious manner" tends to be authorial overkill.

Taylor's conclusion also illustrates that he had not determined whether his purpose was to condemn the trial proceedings or to castigate MacArthur personally. Discussing the *bushido* code of the Japanese warrior (which is said to require "unremitting aggressiveness in the face of certain disaster" and "fanatic obedience to unsound orders"), Taylor concludes:

The *bushido* code . . . seems much more evident in the character of MacArthur than in either Homma or Yamashita. It was MacArthur for whom inefficiency became complicity and guilt. . . . Neither in American law nor in American military tradition is such a code imposed. It was MacArthur, the *bushido* general, who imposed it, and the trial of generals recounted here involved not two but three generals - all, in one way or another, found guilty.

It is clear, however, that the author believes only one of the three generals deserved to be found guilty, and the reader is left with no doubt as to which general the author has in mind.

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The Islamic Criminal Justice System. By M. Cherif Bassiouni. New York: Oceana Publications, 1982. Pp. xxii, 252.

In light of the rise in contact between Islamic culture and law and the rest of the world, M. Cherif Bassiouni's compilation should be considered a timely work. This book is the first comprehensive study on the Islamic criminal justice system to be published in English. It attempts to explain the roots of Islamic Law, clarify the elements of Islamic criminal procedure and jurisprudence, and eliminate the misinformation fostered by sensationalized news accounts and erroneous observers.

Dr. Bassiouni, Professor of Law at DePaul University, has compiled essays by himself and nine other Islamic law scholars from throughout the Middle East. Divided into two parts, the book first explores the rights of criminal defendants under Islamic law, and the rights of those who need protection from criminals, or need a guarantee of human rights. The second part discusses the categories of crimes under Islamic Law, the application of these categories for prevention and enforcement, and the use and theory of punishment under the Islamic criminal justice system.

The first essay, "Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System", written by Dr. Bassiouni, is the longest and perhaps most important essay of the book. Its hypotheses and premises set the foundation and tone for the rest of the book. Using human rights as the basis of his discussion, Bassiouni quickly and clearly identifies the Islamic theory of criminal justice, and thereby exposes the misconceptions of Western observers concerning Islamic criminal law.

According to Dr. Bassiouni, Western scholars and observers experience three difficulties when exploring Islamic law. First, few Westerners understand the historic, political, and social influences which affect Islamic legal theory. Second, misuse of Islamic law by some Arab rulers has led to an inaccurate and negative portrayal of Islamic law. Third, the combination of misuse and misunderstanding has led to sensationalized accounts of the Islamic justice system in the West. Together, these difficulties have hidden many positive elements of Islamic law, such as the human rights discussed in the essay, from the eyes of critical Western observers.

Having thus clarified the reasons for Western misconceptions, Bassiouni and his co-essayists attempt to outline the real basis of Islamic criminal justice. Given the differing cultural foundations, some readers may be surprised at the similarities between Islamic and Western law. The Islamic idea that "the limitations of personal rights operate as limitations against personal abuse of the rights of others" (p. 13) is Lockean

in its sound and consequence. From this basic concept Islamic law derives such individual and minority rights as the freedoms of thought, assembly and association, occupation, and owning of property, and the right of equal access to all public institutions (p. 23). When applied specifically to the criminal justice system, this concept also gives rise to such rights as the right to counsel, due process, and a fair trial, and a protection against *ex post facto* legislation.

After a discussion of these fundamental rights, the book turns to the actual application and procedure of the Islamic criminal justice system. Essays on each category of Islamic crime are presented: *Hudad*, seven specific crimes which are considered against the laws of God; *Qesas*, crimes against the persons such as murder and mayhem; and *Taazir*, either crimes against public welfare and morals or those crimes which are neither *Hudad* or *Qesas*. In addition, there is discussion on the use of evidence in a criminal trial.

The final essay of the book discusses what is perhaps the most sensationalized and misunderstood area of Islamic criminal justice: the use of punishment. In his essay, Dr. Ahmad Abd al-Aziz al-alfi, Dean of Faculty at the University of Zagazig, explains the theories of retribution and deterrence behind Islamic punishment, the method of determining proper punishment, and the manner in which punishment (particularly execution) is finally performed.

Unfortunately, it is in the second part of the book where disappointing weaknesses appear. As the essays move from theory to practice, and thus seemingly to more easily explained topics, the clarity of the book's analysis instead becomes more smudged. For example, the essay titled "Criminal Responsibility in Islamic Law" does not consistently compare and contrast criminal culpability and the exculpation of otherwise criminal acts. When the term "uninterrupted cause" is used to contrast two examples of possible criminal recklessness (p. 173), the reader (particularly if a lawyer) is left without a detailed definition of the term or a clearer explanation of the contrasting elements between the two examples. The confusion would be analogous to an American writer giving two examples of court rulings and merely distinguishing them with the term "proximate causation." Similar problems of vagueness occur in discussions on responsibility for the acts of others (p. 175) and factors counteracting criminal responsibility (p. 182).

The discussion on the already misunderstood area of Islamic punishment is even more troublesome. The explanations given are too incomplete to counteract the discomfort and shock that some Westerners will experience when they read of lashings and amputations. One essayist states that emphasis by Westerners and Western-influenced Moslems on reformation and rehabilitation of the offender "does not accurately reflect reality or represent the wishes of Muslim society." (p. 230) Instead, pun-

ishment must be "sufficiently painful to deter the criminal from walking in the criminal path again," and give "satisfaction for the victim and his family." (p. 231). Unfortunately, without a discussion of the societal and pragmatic considerations behind these severe punishments these explanations may be viewed as mere rationalizations for overly severe penalties. For example, one essayist argues that amputation "allows the criminal to resume his work immediately after, [so] he is also not prevented from supporting himself and his children." (p. 200). This argument raises the question of how an ex-criminal can support a family with only one hand and a foot, the result from punishment for some types of robbery.

Certainly, this is not to say no justification exists for the forms of punishment dictated under Islamic law. Many undeveloped and developing societies, including those of the Islamic world, would find the lost manpower of a man in prison, the price of feeding and securely housing prisoners, and the necessity of supporting the convict's unsupported family too high to bear. Thus, though not apparent from the arguments presented, there is merit behind the desire to quickly return the criminal to his workplace. Likewise, the "severity" of punishments for committing "petty" crimes appears less severe when one considers the limited resources available to a Moslem family on the boundaries of survival. To jail a criminal after he has stolen the few valuables a family might have to pay for vital goods, or those goods themselves, would be ludicrous if the end result would be free food and shelter for the criminal during rehabilitation and slow starvation for the victim's family. Because the authors do not discuss these cultural differences, however, a Westerner's limited frame of reference could result in the unjust criticism of Moslem law, the very problem this book attempts to rectify.

One final problem is the data used by another essayist to substantiate the deterrence value of these punishments. In the essay on *Hudud* crimes, Dr. Aly Aly Mansour, a justice on the Supreme Court of Egypt, argues that the number of amputations in Saudi Arabia for highway robbery over the last 25 years was only 25, and thus is evidence that highway robbery had been deterred. In contrast, Dr. Mansour points to a steep rise in Egyptian prison sentencing for robbery over that same period to indicate that amputation was more effective as a deterrent than imprisonment. However, he has not considered either the relative per capita wealth of Saudi Arabia to Egypt, which could account for the lower rate of robberies, or the increased incidence of prosecution and sentencing of robbers in Egypt. Indeed, amputations may not have had a more deterrent effect in Saudi Arabia, but merely been used infrequently in the last 25 years. In the end, the reader is not convinced by any deterrence argument, but only that data on recidivism is, as usual, incomplete and inconclusive.

Despite these weaknesses, Bassiouni's book is a valuable addition to

the study of international criminal law. The above-noted areas excepted, the book has admirably avoided many obvious problems inherent in discussing alien concepts in an alien tongue. More importantly, most of this book, particularly Bassiouni's essay on human rights, has substantially lessened the denigrating effect of Western stereotypes which have consistently labelled Islamic law as brutal, archaic, and irrational. Bassiouni's compilation, to use a quote of Justice Jackson, gives us "the reasons why we should abandon the smug belief that the Muslim experience has nothing to teach us." (p. 4).

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Conciliation and Arbitration Procedures in Labour Disputes.
By International Labour Office, Geneva 1980. Pp. 183.

In this time of deepening world recession, shrinking union membership, and growing incidence of union 'givebacks', it seems that the balance of power between employer and employee has shifted sufficiently to quash the need to study systems for resolving labor disputes. Nevertheless, new approaches to labor relations have developed during this century in Western nations, and the developing countries have taken steps to prevent confrontation between workers and their employers. The result is an unprecedented international change in the nature of labor relations.

The International Labour Office (ILO) has surveyed systems for arbitration and conciliation of labor disputes. The result is essentially a "book of lists" which does not address adjudicative methods for settling disputes, but rather considers the basic concepts of dispute resolution. The ILO classifies disputes into two broad categories based on the number of persons involved and the nature of the dispute. An individual dispute involves only one worker or a number of workers in their individual capacities, while a collective dispute involves a number of workers in their collective capacity. Where the dispute involves the application or interpretation of existing rights such as work rules, it is termed a conflict of rights. If the issue is the establishment of new rights or more benefits, it is termed an interests dispute.

The ILO study is successful in some areas. Its discussion of the historical development of labor dispute mechanisms, the various types of individual and group conciliation systems, and the requirements for a successful dispute settlement system are particularly informative. It was not until after World War II that collective bargaining in many countries became an object of governmental and legislative attention. During the early days of the trade union movement in Europe, trade unions were unable to deal with individual employers until those employers formed organizations of their own. Through the late 19th century, negotiation was only attempted after a job action or lockout had begun.

Britain was one of the first countries to set up joint employer-employee procedures in 1871 under its Trade Union Act. The Conciliation Act of 1896 marked the beginning of that government's advancement in voluntary machinery to settle disputes. Denmark set up an arbitration board in the printing industry, and subsequently established boards in nearly all other industries by 1900. Most Western European countries made substantial advances in labor arbitration between 1920 and 1940, while less developed countries and former colonies did not initiate labor relations legislation until after 1950 (the Philippines Industrial Peace Act

of 1953 and Kenya's National Joint Consultative Council in 1961, for example).

The Study proceeds with an informative discussion of conciliation procedures, which include conciliation boards and individual conciliators. Conciliation boards are more attractive because they allow both workers' and employers' representatives an active role in resolving the dispute, and it is generally agreed that including representatives of the parties assures acceptance of an agreement. According to the ILO, the long-term trend is toward specialized organizations which are not affiliated with the government. Such organizations are likely to provide better technical support, as well as offer preventative mediation and advice.

Generally, individual conciliators either operate on a part-time basis or are appointed specially for a particular dispute. In most countries, conciliators are appointed for a specific geographic area, serving on a full-time basis. In Australia, conciliators are grouped into panels to deal with disputes in particular industries. In only a few countries, are conciliators appointed on a strictly *ad hoc* basis. Qualifications vary, but independence and impartiality are essential.

According to the ILO, four conditions are necessary to the success of a national dispute settlement system: It must be 1) inexpensive; 2) expeditious; 3) viewed by workers and employers as fairly and justly administered; and 4) composed of conciliators and arbitrators who are impartial, independent and qualified. Another important factor is whether the office is autonomous. In compulsory arbitration, the body is generally autonomous, while an office handling voluntary conciliation and arbitration is linked to a government ministry, usually labor. Autonomous status enhances the unit's independence and shelters the process from partisan politics.

Whereas the foregoing discussions clarify both the historical bases for arbitration and conciliation, and the role of conciliators and arbitration boards, subsequent chapters are highly abstract. Specifically, the portions addressing theories of organization, arbitration procedures, and preventative mediation are lacking in concrete support, and are therefore of limited practical utility.

In distinguishing between bipartite and tripartite dispute settlement mechanisms, the study provides copious detail but leaves the reader without a basic understanding of the underlying theory. The study attempts a distinction between compulsory and voluntary procedures sponsored by the government and then explores four standard methods of collective bargaining: holding back government intervention until all direct negotiations are exhausted; conducting conciliation proceedings under an informal atmosphere; giving the same status to conciliation agreements as is accorded arbitration settlements; and using the possibility of arbitration as a means of promoting conciliation. Without current or historical exam-

ples of these approaches, however, the reader has little insight of how effective these systems have been.

Despite these weaknesses, the study breaks new ground by advocating preventative mediation in international labor relations. The authors recognize "that the causes of industrial strife or industrial peace are profound and complex; that they are often rooted in attitudes, sentiments, a sense of values and even prejudices and misconceptions. . . ." Preventive mediation may be initiated by legislation or administrative policy, but the goal in either case should be to create beneficial labor-management relationships. Labor relations services, such as the British Advisory Conciliation and Arbitration Service, can play a key role in establishing machinery for this type of mediation.

The study concludes with a detailed examination of arbitration. The most widely used is voluntary arbitration, where the award is binding upon the parties. While several countries allow referral of disputes to arbitration at any time, the more common practice is to permit referral only after conciliation has failed. Compulsory arbitration, in contrast, is used only under special circumstances, such as where considerations of public welfare require it, and where it can be used for industry-wide or region-wide disputes. The machinery may be *ad hoc* or permanent, but it is often tripartite.

The key difference between conciliation and arbitration is that conciliation involves dialogue between the parties, while arbitration is essentially adversarial. Furthermore, an arbitration body is limited to the narrow question before it, while conciliators can address the broader issues of relations between the parties.

While informative, the section on arbitration lacks concrete examples which would clarify the various concepts and help the reader understand the labor negotiation process. This work was apparently not intended to serve as a manual for the experienced attorney, but rather as an introduction to the general concepts involved in labor relations and dispute settlement in Western nations. The survey would also be useful to students as an introductory overview of the state of labor dispute mechanisms in the free world. As a survey aimed at the more casual reader, however, the study needs improvement. The ILO has presented an extremely broad topic in a small volume, and has thereby limited itself to generalizations. This approach does not facilitate the learning process, nor does it make for interesting reading. The study would have been more concrete if more historical background had been included and if the investigation had concentrated on a few representative countries. Past labor disputes might thus have been examined in the context of actual cases illustrating the practical application of the relevant concepts. Instead, the reader is faced with lists of countries deemed to fit a particular pattern, with no information on the nature of labor relations in those countries. In view of these

limits, the ILO study will be of interest only to readers desiring a broad survey of generalized themes in labor relations with a minimum of substantive and historical analysis.

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